Robert L. Henry v. State of Florida

THE MARSHAL: PLEASE RISE. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED.

CHIEF JUSTICE: GOOD MORNING. ALL OF THE NICE SMILES THAT WE SEE HERE. THE CASE, NEXT CASE ON THE COURT'S DOCKET IS HENRY VERSUS THE STATE OF FLORIDA. MISS DAY, ARE YOU READY?

THANK YOU, YOUR HONOR, YES, I AM. GOOD MORNING. MAY IT PLEASE THE COURT, I'M RACHEL DAY, ASSISTANT CCRC FOR THE SOUTH ON BEHALF OF MR.^HENRY WHO APPEALED THE DENIAL OF HIS RULE 3.851 MOTION FOLLOWING AN EVIDENTIARY HEARING WHICH WAS GRANTED ON THE ISSUE OF WHETHER TRIAL COUNSEL GRANTED EFFICIENT PERFORMANCE UNDER THE STRICKLAND TEST IN HIS USE OR NOT USE OF MENTAL HEALTH TESTIMONY AND MITIGATION.

CHIEF JUSTICE: COULD YOU JUST CLARIFY THE SITUATION HERE? THAT IS, THAT THIS IS A CASE WHERE ON DIRECT APPEAL, WE UPHELD THE VALIDITY OF MR.^HENRY'S WAIVER OF MITIGATION EVIDENCE, AND I'M TRYING TO UNDERSTAND HOW IN LIGHT OF THAT YOU CAN GET BY ANY REAL -- ANY DEFICIENT PERFORMANCE IN THIS CASE. SO PLEASE TELL US WHERE THE LAW IS AND YOU DO AGREE THERE WAS A WAIVER BY MR.^HENRY THAT THIS COURT ON DIRECT APPEAL UPHELD.

THERE WAS A WAIVER ON THE RECORD AND THAT'S ABSOLUTELY TRUE. HOWEVER, MR.^HENRY'S POSITION IS THAT THIS IS A CASE LIKE STATE VERSUS LEWIS, IN WHICH THE WAIVER WAS NOT SAID TO BE AN ADEQUATE WAIVER BECAUSE MR.^HENRY DID NOT KNOW WHAT MITIGATION EXISTED, PARTICULARLY THE MENTAL HEALTH MITIGATION, AND SO IT IS A LEWIS-TYPE SITUATION THAT WE ARE DEALING WITH AND OF COURSE THIS COURT GRANTED RELIEF ON THE LEWIS CASE BECAUSE IT WAS A GREAT DEAL OF MENTAL HEALTH AND OTHER MITIGATION WHICH TRIAL COUNSEL DIDN'T INVESTIGATE, DIDN'T PRESENT HIS CLIENT SO THE CLIENT COULDN'T MAKE A KNOWING WAIVER AND THAT ONLY CAME OUT IN POST-CONVICTION. THE SAME AS IN THIS CIRCUMSTANCE.

REGARDLESS OF THE WAIVER, THE TRIAL COURT DID HAVE AN EVIDENTIARY HEARING ON WHETHER OR NOT COUNSEL RENDERED COMPETENT PERFORMANCE IN TERMS OF INVESTIGATING THIS EVIDENCE OF MENTAL HEALTH MITIGATION; IS THAT CORRECT?

SIR, IT WAS A LIMITED EVIDENTIARY HEARING, YOUR HONOR.

IT WAS ON THAT ISSUE, WAS IT NOT?

IT WAS ON THE DEFICIENT PERFORMANCE, YES, AND THERE ARE TWO ASPECTS --

HELP US WITH GOING INTO THAT, YOU KNOW, IN TERMS OF THE -- WE SEE FROM THE RECORD HERE THAT COUNSEL TESTIFIED FIRST OF ALL WAS IT PRIOR COUNSEL OR THIS COUNSEL THAT HAD RETAINED THE CONFIDENTIAL EXPERT?

IT WAS PRIOR COUNSEL, YOUR HONOR.

BUT A CONFIDENTIAL EXPERT WAS RETAINED, AND THEN IN ADDITION TO THE EVALUATION BY THAT EXPERT, THERE WAS, I BELIEVE, A PART OF THIS, A MOTION WAS GRANTED TO HAVE TWO

OTHER MENTAL HEALTH PEOPLE EXAMINE THE DEFENDANT WITH REFERENCE TO COMPETENCEY; IS THAT CORRECT?

THE ORIGINAL, I THINK THE -- THE SITUATION AT THE TRIAL WAS, YES. THE ORIGINAL TRIAL COUNSEL WHO REMOVED HIMSELF FROM THE CASE AT SOME POINT BEFORE THE TRIAL DID HAVE A CONFIDENTIAL EXPERT APPOINTED BUT AS SHE TESTIFIED SHE DID A VERY, VERY PRELIMINARY EVALUATION. IT WASN'T ANYTHING TO DO WITH MITIGATION. IT WAS A PRELIMINARY LOOK-SEE GENERALLY WHAT MIGHT BE WRONG WITH THIS INDIVIDUAL. SHE DIDN'T REVIEW ANY RECORDS, SHE WASN'T GIVEN ANY RECORDS. SHE DIDN'T REVIEW ANY COLLATERAL INFORMATION AT ALL. SHE WASN'T GIVEN ANY ACCESS.

HELP US WHEN THERE IS AN EVIDENTIARY HEARING AND THE ORDINARY SITUATION OF THE TRIAL COURT AND THEN LISTENS TO THAT AND THEN MAKES A DECISION AND IT IS A HEAVY BURDEN, IS IT NOT, TO OVERTURN THAT IN TERMS OF THE TRIAL COURT SAYING, WELL, BASED ON THESE PARTICULAR FACTS AND CIRCUMSTANCES, I BELIEVE THAT COUNSEL ACTED COMPETENTLY, AND GIVEN THE GENERAL STATE OF THE LAW FROM STRICKLAND THAT COUNSEL HAS WIDE LATITUDE ON THE SURFACE OF IT, AT LEAST, WE APPEAR TO HAVE COUNSEL WHO HAD THE BENEFIT OF THE CONFIDENTIAL EVALUATION AND THEN THE BENEFIT OF TWO OTHER MENTAL HEALTH EXPERTS, ALBEIT THEY DID NOT SPECIFICALLY EXAMINE THE DEFENDANT FOR PURPOSES OF MITIGATION, DEVELOPING MITIGATION EVIDENCE. WHERE DID THE TRIAL JUDGE GO WRONG THEN IN HOLDING THAT IN THE COMBINATION OF THE PRIOR LAWYER AND THE SUCCESSOR LAWYER THAT THE DEFENDANT WHO AS JUSTICE PARIENTE HAS POINTED OUT, ENDED UP WAIVING MITIGATION, TOO, DID NOT RECEIVE ADEQUATE REPRESENTATION? WHERE DID THE TRIAL JUDGE GO WRONG?

SEVERAL AREAS IN WHICH THE TRIAL JUDGE WENT WRONG, YOUR HONOR.

WHERE DID THE TRIAL JUDGE GO WRONG IN TERMS OF US NOT SECONDGUESSING THE TRIAL JUDGE?

WELL, I THINK THIS COURT AND THE UNITED STATES SUPREME COURT HAS REPEATEDLY HELD, IT IS NOT POSSIBLE TO SHOW THE TRIAL COUNSEL RENDERED DEFICIENT PERFORMANCE IN THE INVESTIGATION OF MITIGATION WITHOUT BEING ABLE TO SHOW WHAT THAT MITIGATION IS. AND FIRST OF ALL, THE TRIAL COURT PRECLUDED MR.^HENRY FROM PRESENTING THE MENTAL HEALTH MITIGATION THAT HAD BEEN DEVELOPED DURING POST-CONVICTION THAT TRIAL COUNSEL SHOULD AND COULD REASONABLY HAVE INVESTIGATED. THIS WAS REASONABLY AVAILABLE MITIGATION THAT REASONABLE TRIAL COUNSEL SHOULD HAVE INVESTIGATED, AND I THINK I CITED IN MY BRIEF TO THE WIGGINS CASE WHERE YOU HAVE TO LOOK FOR REASONABLY AVAILABLE MITIGATION, AND WITHOUT HEARING WHAT THAT MITIGATION WAS, THE MENTAL HEALTH MITIGATION THAT MR.^HENRY WAS PRECLUDED FROM PUTTING ON AT THE EVIDENTIARY HEARING.

APPARENTLY THE CONFIDENTIAL EXPERT THAT THE PRIOR LAWYER SECURED, OKAY, RENDERED A REPORT, OKAY, WHICH WAS PRETTY DAMAGING TO THE DEFENDANT HERE. THAT IS, WAS VERY CRITICAL AND WOULD HAVE BEEN DAMAGING IF THAT EXPERT ACTUALLY WENT ON THE WITNESS STAND AND JUST REPEATED WHAT WAS CONTAINED IN HER REPORT; IS THAT CORRECT?

INSOFAR AS OUR REPORT GOES, THAT MAY VERY WELL BE TRUE. HOWEVER, IT IS NO QUIBBLE FROM THE EVIDENTIARY HEARING TESTIMONY THAT TRIAL COUNSEL MADE VERY LITTLE IF ANY ATTEMPT TO FOLLOW UP FROM THAT REPORT TO SEE IF THERE IS ANYTHING ELSE THAT COULD BE DONE TO GIVE THE MENTAL HEALTH EXPERT ANY FURTHER INFORMATION TO INQUIRE FURTHER OR TO GET A SECOND OPINION.

HOW MANY TIMES DID THAT CONFIDENTIAL EXPERT VISIT WITH THE DEFENDANT?

SHE VISITED WITH HIM EITHER THREE OR FOUR TIMES FOR A FAIRLY SHORT PERIOD EACH TIME. MAYBE A HALF HOUR OR HOUR.

WAS THAT BEFORE THE BEGINNING OF THE GUILT PHASE?

IT WAS BEFORE THE BEGINNING OF THE GUILT PHASE.

IN OTHER WORDS THIS ISN'T A SITUATION WHERE SOMEHOW RIGHT AFTER THE GUILT PHASE A, YOU KNOW, ALL OF THE SUDDEN NOW WE ARE TRYING TO PUT TOGETHER SOMETHING FOR THE PENALTY PHASE. THIS WAS PRIOR DEFENSE LAWYER GETS THIS REPORT WHICH IS NOT JUST DOESN'T HAVE HELPFUL INFORMATION, IT HAS INFORMATION THAT IF THE JURY WERE TO HEAR IT, IT IS JUST REALLY DAMNING OF THIS DEFENDANT.

I THINK THAT THERE ARE SEVERAL WAYS IN WHICH WE CAN LOOK AT THAT PARTICULAR ASPECT. I THINK WE HAVE TO GO BACK TO THE REQUIREMENTS IN THE WIGGINS CASE TO DEVELOP A SOCIAL HISTORY OF THE CLIENT, AND I THINK IN WIGGINS TALKS ABOUT, THE MERE RETENTION OF A MENTAL HEALTH EXPERT IS NOT SUFFICIENT IN THIS PARTICULAR CIRCUMSTANCE. AND IN WIGGINS, IN FACT, DEFICIENT PERFORMANCE WAS FOUND, EVEN THOUGH THE MENTAL HEALTH EXPERT HAD ACTUALLY CONSULTED WITH SOME OF THE FAMILY MEMBERS WHO HAD BEEN AROUND THE CLIENT WHEN HE WAS GROWING UP. IN THIS PARTICULAR CASE, THE PSYCHOLOGIST, DR.^TRUDY BLOCK-GARFIELD DID HAVE VERY LIMITED EVALUATION IN A COMPLETE VACUUM. SHE RELIED TOTALLY ON THE DEFENDANT'S SELF-REPORT AND HER OWN VERY LIMITED PSYCHOLOGICAL TESTING. SHE DIDN'T DO ANY NEUROPSYCHOLOGICAL TESTING, SHE DIDN'T LOOK AT ANY RECORDS.

CHIEF JUSTICE: WAS SHE RETAINED SOLELY TO EVALUATE COMPETENCEY?

THAT'S WHAT HER REPORT WOULD INDICATE.

CHIEF JUSTICE: WHAT WAS HER TESTIMONY?

HER TESTIMONY WAS THAT IF SHE HAD BEEN ASKED TO LOOK AT MITIGATION, SHE WOULD HAVE LAID OUT EVERY SINGLE PIECE OF INFORMATION THAT SHE LOOKED AT.

CHIEF JUSTICE: SO WHAT WAS THE TESTIMONY OF THE DEFENSE LAWYER? WAS SHE RETAINED JUST FOR COMPETENCEY OR A BROADER --

HE DIDN'T KNOW BECAUSE HE DIDN'T RETAIN HER. PRIOR COUNSEL WAS DECEASED AT THE TIME OF THE EVIDENTIARY HEARING.

CHIEF JUSTICE: BUT DID COUNSEL THAT DID TESTIFY, TESTIFIED HE SPOKE WITH HER AND DETERMINED THAT BASED ON WHAT SHE HAD TO SAY THERE WOULD -- IT WOULD NOT BE WORTHWHILE TO PURSUE FURTHER MENTAL HEALTH MITIGATION; IS THAT ESSENTIALLY WHAT HE SAID?

THAT'S ESSENTIALLY WHAT --.

CHIEF JUSTICE: AND THE JUDGE FOUND THAT TO BE CREDIBLE?

THE JUDGE FOUND THAT TO BE CRITICAL.

CHIEF JUSTICE: CREDIBLE AND CRITICAL?

THE JUDGE FOUND IT TO BE CRITICAL, ALSO, AND HE BASED HIS OPINION ON THAT. HOWEVER, I THINK WE NEED TO LOOK AT THE TESTIMONY OF DR.^TRUDY BLOCK-GARFIELD HERSELF AS TO

HOW IT WOULD HAVE BEEN DIFFERENT IF SHE HAD DONE AN EVALUATION TO DEVELOP MENTAL HEALTH MITIGATION. SHE SAID SHE WOULD HAVE LOOKED AT THE REPORT WAS CLEARLY NOT. IT WAS PREDICATED ON A GENERAL COMPETENCEY OR INSANITY TYPE OF EVALUATION WITHOUT THE BENEFIT OF ANY OF HER RECORDS. SHE WOULD HAVE WANTED TO LOOK AT COLLATERAL INFORMATION. SHE WOULD HAVE WANTED TO GET ANYTHING THAT TRIAL COUNSEL COULD POSSIBLY HAVE GIVEN HER IN TERMS OF RECORDS, IN TERMS OF ACCESS TO FAMILY RECORDS, IN TERMS OF ANY INFORMATION AT ALL THAT MIGHT ATTRACT SOME KIND OF IDEA ON WHAT THE CLIENT'S BACKGROUND WAS LIKE AND THE MENTAL HEALTH MITIGATION FOR MITIGATION WORK IN THE CAPITAL CASE IS A GREAT DEAL MORE COMPREHENSIVE AND I THINK YOU CAN LOOK AT THE TESTIMONY OF MR.^NORGARD WHO TESTIFIED AT THAT TIME THAT IT IS REALLY A WHOLE DIFFERENT KIND OF EVALUATION THAT WE ARE LOOKING AT. SO THAT'S THE FIRST THING. FURTHERMORE, SHE TESTIFIED THAT IF SHE HAD THE KIND OF INFORMATION THAT WAS MADE AVAILABLE TO THE POST-CONVICTION HEARING AS TO MR.^HENRY'S BACKGROUND AND IN PARTICULAR HIS EXTENSIVE DRUG HISTORY, SHE MAY VERY WELL HAVE RECOMMENDED THE USE OF FURTHER EXPERTS, SPECIFICALLY A NEUROPSYCHOLOGIST. SHE TESTIFIED IN QUITE DEPTH ABOUT THE EFFECTS OF CRACK COCAINE ON THE DEVELOPING BRAIN.

CHIEF JUSTICE: MR.^HENRY, WE CAN'T LOOK AT THIS AS YOU WOULD AGREE IN A VACUUM. MR.^HENRY, AGAINST THE ADVICE OF COUNSEL, TOOK THE STAND IN THE GUILT PHASE, AND DENIED -- HE DENIED HIS INVOLVEMENT, CORRECT?

YES.

CHIEF JUSTICE: AND HIS PLAUSIBLE SCENARIO.

HE SAID HE WASN'T THERE AND HE WASN'T INVOLVED.

CHIEF JUSTICE: SO ARE YOU NOW SAYING THAT THE TRIAL COUNSEL WAS DEFICIENT IN NOT PURSUING VOLUNTARY INTOXICATION AS A DEFENSE?

THAT IS ONE SMALL ASPECT OF WHAT WE ARE SAYING. WE CERTAINLY CONTEND THAT MR.^HENRY WAS IN PSYCHOSIS AT THE TRIAL AND WE WOULD HAVE PUT ON EVIDENCE TO SHOW THAT.

YOU DON'T MEAN AT THE TIME OF THE TRIAL?

I MEAN AT THE TIME OF THE CRIME, YES. THE DRUG HISTORY WAS EVEN MORE IMPORTANT BECAUSE IT WAS EXTENSIVE, IT WAS LONG-LASTING, THERE WAS TESTIMONY AT THE EVIDENTIARY HEARING FROM MR.^HENRY'S BROTHER, JOSEPH, IN PARTICULAR, WHO TALKED ABOUT THE NUMBER AND EXTENT AND DIFFERENT DRUGS THAT THEY USED ON A VERY REGULAR BASIS ALL THROUGH HIGH SCHOOL. DR.^GARFIELD TESTIFIED THAT HAD SHE KNOWN ABOUT THAT, IT WOULD HAVE MADE HER EVALUATION COMPLETELY DIFFERENT. SHE WASN'T TOLD ABOUT IT. SO SHE DIDN'T PURSUE IT. SO THAT IS A SITUATION WITH REGARD TO THAT. I THINK YOU HAVE TO LOOK NOT ONLY AT DR.^BLOCK-GARFIELD'S EVALUATION, THOUGH, BUT AT THE EVALUATIONS OF THE EXPERTS WHO EVALUATED MR.^HENRY IN POST-CONVICTION TO DETERMINE THE EASILY AVAILABLE MITIGATION THAT WAS, INDEED, PRESENT.

LET ME ASK YOU QUESTION ON THE DRUG USE. THE DOCTOR ASKED MR.^HENRY ABOUT DRUG USE IN HER EVALUATION, CORRECT?

FLEETINGLY, YES.

AND HIS RESPONSE WAS --

HIS RESPONSE WAS THAT HE DENIED USING ANYTHING OTHER THAN MARIJUANA. HE DID ADMIT

TO USING MARIJUANA TO DR.^BLOCK-GARFIELD BUT I THINK YOU HAVE TO LOOK AT THIS IN THE CONTEXT OF THE WIGGINS' ANALYSIS. WIGGINS SAYS THAT THE ABA GUIDELINES ARE A GUIDE TO WHAT IS REASONABLE IN THE INVESTIGATION OF MITIGATION IN A CAPITAL PENALTY PHASE. THE COMMENTARY TO THE GUIDELINES IT IS CLEAR THAT A LOT OF WHAT THESE CLIENTS ARE FACED WITH ABOUT HAVING TO EXPLAIN PARTICULARLY TO AUTHORITY FIGURES, IT IS VERY DIFFICULT FOR THEM TO COME TO TERMS WITH SOME OF THE THINGS THAT HAPPENED TO THEM, LIKE SEXUAL ABUSE AND INDEED LIKE ILLICIT DRUG USE. IT IS HARD TO DO, AND IT IS CERTAINLY POSSIBLE IF MR.^NORGARD SAID --

SO BASICALLY WHAT YOU WANT US TO DO IS IF YOU HAVE A CLIENT WHO IS FOUND COMPETENT BY SEVERAL EXPERTS AND THERE IS NO EVIDENCE IN THOSE REPORTS THAT YOU CANNOT RELY UPON WHAT THAT CLIENT IS SAYING WHEN THE CLIENTELES THE PHYSICIAN AND THE ATTORNEY I DID NOT HAVE A DRUG PROBLEM, THAT THE ATTORNEY STILL HAS TO GO BEYOND THAT DESPITE ANYTHING MORE?

I THINK, YOUR HONOR, THAT WE SHOULD BE GUIDED BY WHAT THE ADA GUIDELINES SAY ON THAT WHICH IS THAT YOU NEED TO LOOK AT THIS SORT OF INFORMATION FROM MULTIPLE SOURCES, WHICH IS WHY WE HAVE TO DO A SOCIAL HISTORY. WE HAVE TO LOOK AT NOT ONLY THE DEFENDANTS THEMSELVES WHO MAY BE ASHAMED OF WHAT THEY HAVE DONE AND MAY BE RELUCTANT TO TELL THE TRUTH BUT WE HAVE TO LOOK AT PEOPLE WHO ARE AROUND THE DEFENDANT WHO MAY HAVE SEEN THEM DOING, ACTING IN A STRANGE WAY WHO MAY HAVE SEEN THEM USING DRUGS WHO MAY HAVE BEEN DOING DRUGS WITH THEM.

WHAT EVIDENCE WAS THERE IN THIS CASE OF INDEPENDENT WITNESSES TESTIFYING TO HIS DRUG USE AT THE TIME OF THE OFFENSE?

WELL, MR.^HENRY'S BROTHER, JOSEPH, WHO TESTIFIED AT THE EVIDENTIARY HEARING, SAID THAT HE DID DRUGS THROUGHOUT HIGH SCHOOL WITH MR.^HENRY ON A REGULAR BASIS.

I'M TALKING ABOUT SURROUNDING THE CIRCUMSTANCES OF THIS CRIME, DRUG USE. THE DAY OF, THE WEEK OF.

THERE WERE A NUMBER OF PEOPLE WHO, AGAIN THIS IS HAS TO DO MORE WITH INVOLUNTARY INTOXICATION RATHER THAN THE DRUG USE.

OR DRUG USE AROUND THE TIME OF THE EVENT.

WELL, IT WAS HIS TESTIMONY THAT HE HAD SEEN MR.^HENRY WITH CRACK COCAINE ALTHOUGH HE HAS NOT SEEN HIM USING IT ADMITTEDLY BUT I WOULD, HOWEVER, WHAT I WAS TRYING TO GET AT WAS THE DRUG HISTORY WHICH IN ITSELF SHOULD HAVE PUT COUNSEL ON NOTICE THAT THERE MIGHT BE SOMETHING MORE GOING ON MENTAL HEALTH WISE.

WAS THAT, I NOTICE THAT IN THIS CASE ALTHOUGH MR.^HENRY SAID HE DID NOT WANT TO PUT ON A MITIGATION CASE, DEFENSE COUNSEL SAYS HE ACCEPTED -- SUBPOENAED CERTAIN WITNESSES TO COME TO TRIAL ANYWAY AND THEY DID NOT SHOW UP; IS THAT CORRECT?

THAT IS CORRECT.

WHAT WOULD HAVE BEEN THE PURPOSE OF THOSE WITNESSES? WERE THEY WITNESSES ABOUT THIS DRUG USE OR JUST WHAT?

THE RECORD REALLY DOESN'T SHOW. MR.^RATICOFF COULDN'T REMEMBER AT THE EVIDENTIARY HEARING. THE RECORD OF THE PENALTY PHASE IS EXPLICITLY CLAIMED ATTORNEY/CLIENT PRIVILEGE FOR DETERMINING WHAT THAT EVIDENCE WOULD HAVE BEEN. IN FACT, THE PROSECUTOR, MR.^SAPP, ASKED FOR A PROFFER OF WHAT THAT TESTIMONY WOULD HAVE BEEN,

BUT I THINK IT IS INTERESTING TO NOTE THAT OF THOSE FIVE WITNESSES WHO WERE REPORTEDLY SUBPOENAED, TWO OF THEM WE PUT ON AT THE EVIDENTIARY HEARING AND THEY DID NOT RECEIVE SERVICE OF THOSE SUBPOENAS, AND I THINK IF ONE LOOKS AT THE TESTIMONY OF MR.^HENRY HIMSELF, HE IS REALLY RELUCTANT TO HAVE THE COURT ISSUE A SHOW CAUSE ORDER AGAINST HIS RELATIVES. HE DOESN'T WANT THEM GETTING INTO TROUBLE.

CHIEF JUSTICE: YOU ARE IN YOUR REBUTTAL.

IN THAT CASE, YOUR HONOR, I WOULD LIKE TO RESERVE THE REMAINDER OF MY TIME FOR REBUTTAL. THANK YOU.

GOOD MORNING, MAY IT PLEASE THE COURT. CELIA TERENZIO ON BEHALF OF THE STATE OF FLORIDA. THE TRIAL COURT IN THIS CASE EXTENSIVE ORDER DENYING POST-CONVICTION RELIEF SAID IN PART, BASED ON THE EVIDENCE PRESENTED, THIS COURT FINDS THAT THE INFORMATION RATICOFF AND THE THREE MENTAL HEALTH EXPERTS HAD PRIOR TO TRIAL IN '87 AND '88 WOULD NOT HAVE REQUIRED FURTHER MENTAL HEALTH INVESTIGATION BECAUSE THERE WAS NO INDICIA PRESENT OF A CHRONIC OR ACUTE DRUG PROBLEM OR ADDICTION, ALTERED STATE OF CONSCIOUSNESS, MENTAL RETARDATION OR MENTAL ILLNESS.

BUT WEREN'T THESE EVALUATIONS DONE FOR THE PURPOSE OF DETERMINING THE DEFENDANT'S COMPETENCEY TO STAND TRIAL AND WHILE HE MAY HAVE BEEN FOUND COMPETENT TO STAND TRIAL ISN'T THERE A DIFFERENT INVESTIGATION WHEN YOU ARE TALKING ABOUT WHETHER OR NOT THERE IS ANY MENTAL HEALTH MITIGATION THAT CAN BE PRESENTED AT THE PENALTY PHASE?

WELL, DR.^TRUDY BLOCK-GARFIELD WAS A CONFIDENTIAL EXPERT. NOW, SHE -- HER REPORT, EXCUSE ME, HER FINDINGS, HER FILE WAS LOST, AND ORIGINAL DEFENSE COUNSEL WAS DECEASED AT THE TIME OF THE EVIDENTIARY HEARING. BUT SHE DID TESTIFY, AND I WOULD JUST LIKE TO READ SOME OF HER TESTIMONY.

THIS IS TESTIMONY WHERE?

AT THE EVIDENTIARY HEARING FROM DR.^GARFIELD. SHE EXPLAINED THAT HER EVALUATION OF APPELLANT PRIOR TO TRIAL INCLUDED A PSYCHOLOGICAL AND EMOTIONAL FUNCTIONAL ASSESSMENT. SHE SAID SHE WAS UNABLE TO REMEMBER IF THE SCOPE WAS MITIGATION OR NOT, BUT CLEARLY SHE ALSO TESTIFIED THAT THE FOUR TESTS THAT SHE CONDUCTED, IF THERE WAS ORGANIC BRAIN DAMAGE PRESENT, IT WOULD HAVE PICKED IT UP. SHE WOULD HAVE RECOMMENDED FURTHER TESTING. SHE ALSO SAID THAT HER INITIAL APPROACH TO EVALUATIONS, WHETHER IT IS FOR MITIGATION OR INSANITY, NOW I AM QUOTING HER AGAIN, SHE SAID THERE WOULD NOT BE MUCH DIFFERENT THAN HER, REGARDLESS OF WHAT SHE WAS ASKED TO DO, BECAUSE SHE WOULD STILL BE REQUESTING THE SAME TYPE OF INFORMATION. SHE WOULD WANT TO KNOW MORE ABOUT THAT PERSON'S STATE OF MIND AROUND THE TIME OF THE CRIME.

BUT DIDN'T SHE ALSO SAY DURING THE COURSE OF THAT EVALUATION, THAT TESTIMONY, DIDN'T SHE ALSO TALK ABOUT THE FACT THAT IF SHE HAD BEEN ASKED ABOUT MITIGATION SHE WOULD HAVE HAD SOME DIFFERENT THINGS IN HER REPORT AND THAT SHE DID NOT, IN FACT, HAVE BACKGROUND INFORMATION ON THE DEFENDANT?

WELL, SHE WASN'T -- HER TESTIMONY WAS SHE DOUBTED WHETHER SHE GOT COLLATERAL INFORMATION, BECAUSE SHE SAID IF SHE HAD IT WOULD HAVE BEEN LISTED IN HER REPORT. MR.^RATICOFF TESTIFIED THAT HE REMEMBERS TALKING TO MR.^SOLOMAN WHO HAD RETAINED BLOCK-GARFIELD, AND HE SAID HE TALKED TO HIM AS ONE OF THE FIRST QUESTIONS HE ASKED HIM, AND THAT IS DID YOU PROVIDE DR.^GARFIELD WITH THE DOCUMENTS AND HE REFERRED TO MILITARY RECORDS AND POSSIBLE DRUG USE, AND SOLOMAN EMPHATICALLY SAID TO HIM, YES, I

DID. THIS IS NOT A CASE WHERE DRUG ABUSE OR ADDICTION WAS AN AFTERTHOUGHT. LESS THAN A MONTH AFTER MR.^SOLOMAN WAS APPOINTED, HE REQUESTED THE CONFIDENTIAL EXPERT. DR.^GARFIELD, WHO TESTIFIED THAT SHE DESCRIBED THE AMOUNT OF TIME THAT SHE SPENT WITH HENRY AS SIGNIFICANT. SHE SAW HIM ON FOUR SEPARATE OCCASIONS.

DID SHE SPEND ANY TIME OR DID SHE JUST -- DID SHE DISCUSS ANY OF THIS WITH MR.^HENRY'S FAMILY?

DID SHE? NO, SHE DIDN'T. BUT MR.^RATICOFF DID, MR.^SOLO MAN DID.

THEY ACTUALLY CONTACTED FAMILIS?.

YES.

SO AGAIN IT IS NOT A SITUATION WHERE BECAUSE THE TRIAL COURT COMES TO THE CONCLUSION AFTER A VERY, VERY LENGTHY ORDER, THAT IT WAS REALLY MR.^HENRY THAT IMPEDED THE INVESTIGATION, BUT IT APPEARS HERE THAT ALTHOUGH MR.^HENRY EVENTUALLY SAID, NO, I DON'T WANT ANY OF THIS MITIGATION, THAT HE MUST HAVE GIVEN NAMES OF PEOPLE.

SURE.

CHIEF JUSTICE: I MEAN, THEY DID PURSUE IT. SO EXPLAIN CHRONOLOGICALLY, SO AN INVESTIGATION WAS DONE?

YES.

CHIEF JUSTICE: AND THESE WITNESSES WERE KNOWN?

YES. WITNESSES WERE KNOWN. MR.^RATICOFF TESTIFIED THAT HE SPOKE AT LENGTH TO HENRY'S MOTHER, HENRY'S AUNT, AND OBVIOUSLY HENRY.

AND WHAT WAS THE -- DO WE KNOW WHAT KIND OF INFORMATION THE AUNT AND THE MOTHER AND I ASSUME THERE WERE TWO OR THREE OTHER PEOPLE THAT HAVE BEEN SUBPOENAED? DO WE KNOW WHAT KIND OF INFORMATION THAT THEY WERE PREPARED TO GIVE? BECAUSE I DON'T RECALL SEEING THAT.

YES. TWO THINGS. MR.^RATICOFF TESTIFIED THAT HE SUBPOENAED THOSE PEOPLE AND HE GOT THEIR NAMES OBVIOUSLY FROM MR.^HENRY AND MR.^HENRY DID NOT DENY THAT AT THE WAIVER HEARING. THOSE PEOPLE WOULD HAVE TESTIFIED TO HIS CHILDHOOD TRAUMA AND EXTENSIVE CHILD ABUSE, WHICH DR.^GARFIELD DOCUMENTED EXTENSIVELY IN HER FINDINGS, AND HIS MILITARY HISTORY AND RECORD IN VIETNAM. THOSE WERE THE TYPES OF THINGS THAT HE SAID HE WOULD HAVE HAD THEM PRESENT, BUT YOU ALSO JUST HAVE TO LOOK AT THREE OF THOSE PEOPLE DID TESTIFY AT THE EVIDENTIARY HEARING. TWO FORMER GIRLFRIENDS WHO WERE SUBPOENAED, AND THE DEFENDANT SISTER. AND IF YOU LOOK AT THEIR TESTIMONY, THE TWO EX-GIRLFRIENDS, THE BEST THEY COULD SAY WAS THAT THEY HEARD THAT THE DEFENDANT MAY HAVE BEEN USING DRUGS. NEITHER ONE OF THEM EVER SAW THE DEFENDANT USE DRUGS, AND THE SISTER ALSO SAID THAT SHE HEARD, SHE KNEW THAT HER BROTHER HAD SMOKED MARIJUANA ON A REGULAR BASIS, AND THAT SHE HAD HEARD THAT HE WAS DOING COCAINE. SO THAT IS -- YOU TAKE THOSE TWO THINGS TOGETHER, AND YOU STILL COME UP WITH NOTHING, AND I THINK THAT'S THE BASIS OF THE TRIAL COURT'S FINDING HERE IS REGARDLESS OF THE FACT THAT THE DEFENDANT HAD WAIVED MITIGATION, OKAY, RATICOFF DID NOT JUST DO NOTHING AND STOP. HE DID INVESTIGATE, AND YOU LOOK AT WHAT'S PRESENTED IN OR UNCOVERED IN '87, AND YOU COMPARE IT TO WHAT WAS UNCOVERED IN 2000 AND 2001, THERE IS EXACTLY THE SAME INFORMATION.

CHIEF JUSTICE: LET'S PUT ASIDE THE DRUG USE AND THE FAMILY MEMBER WITNESSES. ON THE ISSUE OF BRAIN DAMAGE, ORGANIC BRAIN DAMAGE WHICH THEY SAY SHOULD HAVE BEEN PURSUED. WHAT EVIDENCE CAME OUT AT THE EVIDENTIARY HEARING ABOUT WHAT THE CURRENT EXPERTS FOUND ABOUT WHETHER OR NOT HE HAD SIGNIFICANT BRAIN DAMAGE?

OKAY.

CHIEF JUSTICE: AND THERE I'M CONCERNED ABOUT THIS BY FUR INDICATION, YOU KNOW -- BIFURCATION. I MEAN, HERE IS A CASE THAT WAS FILED IN '99, THE EVIDENTIARY HEARING IN 2000, 2001 THERE IS A 60-PAGE ORDER. TOOK ANOTHER TWO YEARS FOR THE ORDER TO BE WRITTEN. THREE YEARS ON APPEAL, AND DID WE HAVE AN ARBITRARY DECISION, NOT AN ARBITRARY DECISION BUT THIS IDEA THAT ALTHOUGH YES, YOU CAN DENY AN EVIDENTIARY HEARING, POST-CONVICTION ON EITHER PREJUDICE OR DEFICIENT PERFORMANCE, SOMETIMES THE TWO ARE RELATED.

RIGHT.

SO WHAT WAS THE EVIDENCE ON THAT?

AND SOMETIMES THEY ARE RELATED AND CLEARLY SOMETIMES THEY ARE NOT. AND IN THIS CASE, THE EVIDENCE WAS NOT RELATED. THE WAY THIS ISSUE WAS PRESENTED IS THAT THEY COULD GET DEFENSE ATTORNEY, EXCUSE ME, NEW DOCTORS TO SAY THAT BASED ON MR.^HENRY'S DRUG USE THEY CLAIM THAT HE WOULD HAVE OR THAT HE HAS ORGANIC BRAIN DAMAGE.

CHIEF JUSTICE: BUT WOULD THEY PREVENT HIM FROM TESTIFYING THAT HE HAD AN ORGANIC BRAIN DAMAGE?

THE JUDGE STOPPED THEM SHORT OF RENDERING AN OPINION.

CHIEF JUSTICE: WELL, IN OTHER WORDS, IF SOMEBODY, FOR LET'S JUST SAY IT WAS MENTAL RETARDATION, AND THEY SAY, WELL, THERE IS EVIDENCE HERE OF MENTAL RETARDATION AND THEN THE QUESTION WAS, WELL, WAS HE MENTALLY RETARDED. MAYBE THAT'S NOT A GOOD ANALOGY, BECAUSE ATKINS WOULD ALLOW THAT TO BE DEVELOPED BUT IT IS PRETTY HARD IF SOMEBODY IS CLEARLY BRAIN DAMAGED THEN THEIR PERFORMANCE MAY BE DEFICIENT BECAUSE IT SHOULD BE OBVIOUS. IF IS IT IS SUBTLE BRAIN DAMAGE IT INFORMS YOUR DECISION ABOUT WHETHER IT WAS REASONABLE OR NOT TO KNOW WHETHER OR NOT THEY FOUND BRAIN DAMAGE.

I WOULD AGREE WITH THE COURT IF THE DEFENSE ATTORNEY HAD NOT SECURED, OKAY, THE ASSISTANCE OF MENTAL HEALTH PROFESSIONALS. HE DID. HE GOT THREE PEOPLE, AND SO AT THIS POINT AND THIS COURT NEEDS TO LOOK AT IN TERMS OF HIS INVESTIGATION, HAS NEW COUNSEL COME UP WITH BETTER EVIDENCE, DIFFERENT EVIDENCE THAT THESE OTHER EXPERTS DID NOT HAVE, AND THAT'S --.

CHIEF JUSTICE: HOW DO WE KNOW THAT IF THEY DIDN'T TESTIFY TO IT?

THEY WERE ALLOWED TO TESTIFY TO ANYTHING IN TERMS OF WHAT INFORMATION DID THEY HAVE TO RENDER THEIR OPINION. THAT'S WHAT THEY WERE ALL -- THEY ALL TESTIFIED. OKAY, ALL OF THE DOCTORS TESTIFIED, AND THEY WERE REPEATEDLY ASKED, OKAY, WHAT INFORMATION DID YOU HAVE WHEN YOU SAW THE DEFENDANT IN 2000 AND 2001 THAT WAS NOT AVAILABLE IN 1988, 1987.

AREN'T WE IN SORT OF A CHICKEN AND EGG, THOUGH? I RECOGNIZE THIS CASE, YOU KNOW, WITH

THE FACT THAT THERE IS THE ORIGINAL EVALUATION AND THEN THE COMPETENCEY, THE TWO COMPETENCEY EVALUATIONS LATER, AND THE OTHER INVESTIGATION THAT YOU ARE TALKING ABOUT BY COUNSEL, PLUS A DEFENDANT WHO IS TELLING THE LAWYER, YOU KNOW, NOT TO DO THIS STUFF, BUT THERE WERE PROFFERS ALLOWED. DID THE PROFFERS GO TO THE PREJUDICE PRONG TO THE EXTENT? WHAT WERE THE PROFFERS ALL ABOUT?

WHAT INFORMATION THESE DOCTORS, THESE NEW DOCTORS WERE PROVIDED WITH. BASICALLY IT WAS THE TWO VOLUME SET OF MATERIALS THEY WERE GIVEN BY CURRENT COUNSEL.

AND THIS IS BACKGROUND MATERIAL?

WHICH THEY CALL BACKGROUND MATERIAL, BUT WHEN YOU LOOK AT ALL OF THAT MATERIAL, EVERYTHING THAT IS IN THERE IS INFORMATION THAT WAS KNOWN ALREADY BY THE DEFENSE ATTORNEY.

CHIEF JUSTICE: WHAT WAS IT A PROFFER? WHY WASN'T IT JUST TESTIFIED TO?

AGAIN, IF YOU LOOK AT THEIR TESTIMONY, PART OF IT WOULD SEEM LIKE IT WAS A PROFFER AND THEN THE JUDGE SAID I AM GOING TO LET YOU TALK ABOUT DEFICIENCY.

BUT THE PROFFER, I ASSUME THAT IT MEANS THAT THE TRIAL JUDGE DIDN'T CONSIDER THAT. WE ARE LEFT WITH ALMOST THE CHICKEN AND EGG AS FAR AS HOW WE EXAMINE THEM THEN THE PROFFER, BUT COME BACK ONE MORE TIME ABOUT BIFURCATING THE SITUATION HERE. THAT IS, THAT IT DOES, IT CAUSES US MUCH MORE OF A STRUGGLE BECAUSE YOU ARE SORT OF SAYING, WELL, WHAT IS IT THAT THESE NEW EXPERTS FOUND THAT WAS -- THAT WAS SO SUBSTANTIAL THAT, YOU KNOW, THAT --

THAT IS NOT THE STANDARD. IT IS NOT WHAT THESE NEW EXPERTS FOUND BECAUSE THAT'S ASSUMING THAT YOU ARE ALLOWED TO BRING THIS, THEY FOUND ORGANIC BRAIN DAMAGE. THAT'S NOT THE STANDARD. THAT'S NOT THE LAW.

I'M TALKING ABOUT THE SUBTLE DISTINCTION BETWEEN AN EXPERT SAYING, WELL, THIS FELLOW HAD IMPRINTED ON HIS FOREHEAD BRAIN DAMAGE. AND, YOU KNOW, WE FIND BRAIN DAMAGE AS A RESULT OF THAT. THIS IS ONE OF THE CLEAREST CASES OF BRAIN DAMAGE THAT WE HAVE EVER SEEN AND HERE'S HOW EXTENSIVE IT IS. NOW, I AM NOT SURE HOW THE TRIAL JUDGE WOULD TREAT THAT. WHETHER THE TRIAL JUDGE WOULD SAY, I'LL ALLOW THAT, BECAUSE NOW YOU ARE SAYING.

IT TOOK THEM TWO YEARS TO WRITE THE ORDER. IF THEY FOUND DEFICIENT PERFORMANCE HE WAS GOING TO HAVE ANOTHER HEARING ON PREJUDICE?

YES, YOUR HONOR.

IS THAT SOMETHING THAT THE STATE REQUESTED OR THAT THE TRIAL JUDGE JUST DECIDED ON HIS OWN?

THE STATE REQUESTED THAT THE COURT ONLY LIMIT THE HEARING TO THE DEFICIENCY STRONG, AND AGAIN THE LAW IS NOT THAT YOU GET A NEW SHOT AT THE SAME EVIDENCE. I MEAN, YOU ARE NOT ENTITLED TO RELIEF IF YOU RELY ON THE SAME EVIDENCE AND YOU JUST HAVE NEW DOCTORS THAT GIVE YOU A BETTER --

THAT MAY BE AN OUT, YOU KNOW, WE'VE SAID THAT IN OUTCOMES. TO EXPLAIN TO US WHAT THE -- THAT THE STATE APPARENTLY ASKED FOR SUPPLEMENTAL HEARINGS. THAT IS THERE WAS A HEARING BUT THEN AFTERWARDS THE JUDGE APPARENTLY DID OPEN IT UP EVEN MORE. WHAT COULD YOU TELL US WHAT THAT WAS ALL ABOUT?

THERE WAS CONFUSION OVER THE FIRST HEARING IN OCTOBER. THERE WAS CONFUSION OVER WHAT WITNESSES WERE GOING TO BE ALLOWED TO BE PRESENTED. THE DEFENSE THOUGHT THE JUDGE WAS ONLY LIMITING IT TO MR.^RATICOFF AND THE FORMER DOCTOR. WHEN THEY TESTIFIED THEN THE JUDGE SAYS, OKAY, WHO IS YOUR NEXT WITNESS, AND THEY SAID WE WERE UNDER THE MISTAKEN BELIEF YOU ARE ONLY GOING TO HEAR FROM RATICOFF AND DR.^BLOCK-GARFIELD, THE STATE DID A MOTION TO THE COURT SAYING GIVEN THAT THERE WAS ON CONFUSION THE COURT LET'S THEM REOPEN AND PUT ON ANYTHING THEY WANT TO TERMS OF DEFICIENCY, WHAT NEW EVIDENCE TO USE A PHRASE FROM THIS COURT, WHAT RED FLAGS DID THIS COUNSEL MISS, OKAY, THERE WAS NO EVIDENCE OF ANY PRIOR HOSPITALIZATION, NO PRIOR EVALUATIONS, NO EVIDENCE OF DRUG OVERDOSE. NO EVIDENCE THAT MR.^HENRY AT ANY TIME THAT HIS LIFE WAS CONSUMED WITH DRUGS AND IT INTERFERED WITH HIS DAILY LIVING. THAT'S WHAT THE JUDGE WAS LOOKING FOR. WHAT SMOKING GUN DID MR.^RATICOFF AND MR.^SOLOMAN MISS.

LET ME GET BACK TO THE PARAMETERS OF THE HEARING. REGARDLESS OF THE ULTIMATE OUTCOME OF THIS APPEAL. I'M CONCERNED THAT THE STATE IS REQUESTING THE COURT, THE TRIAL JUDGES, MAYBE MORE THAN ONE, TO BIFURCATE THE HEARING. IT SEEMS TO ME THAT ALTHOUGH THERE ARE TWO DIFFERENT PRONGS, TO STRICKLAND, THE FACTS REGARDING THE PRONGS OVERLAP.

NOT IN THIS CASE.

MAYBE NOT IN THIS CASE, BUT IN SOME CASES THEY DO AND PERHAPS IN MANY CASES THEY DO AND WE HAD A CASE CALLED GROVSNER VERSUS STATE WHERE THE JUDGE BIFURCATED THE HEARING, DETERMINED THERE WAS NO PREJUDICE AND ON APPEAL WE DECIDED THERE WAS PREJUDICE AND THERE WAS EVIDENCE AT THE HEARING THAT WENT TO THE DEFICIENT PERFORMANCE PRONG BUT WE COULDN'T CONSIDER IT, BECAUSE THE JUDGE DIDN'T CONSIDER DEFICIENT PERFORMANCE SO IT SEEMS TO ME A VERY INEFFICIENT WAY TO OPERATE AND THEN ON TOP OF THAT, THERE IS THE FACT THAT IF THEY REVERSE ON ONE PRONG AFTER SEVERAL YEARS OF LITIGATION WE NOW HAVE TO GO BACK AND HAVE AN EVIDENTIARY HEARING ON THE OTHER PRONG SEVERAL YEARS LATER.

THE STATE SUPPLEMENTED WITH GROVSNER LAST WEEK, YOUR HONOR, AND IT IS CLEAR THAT THIS COURT DOES GIVE THE DISCRETION TO THE TRIAL JUDGES TO DECIDE.

WE ALSO DISCOURAGED THE JUDGE FROM DOING THAT, DIDN'T WE, WE SAID THE BETTER PRACTICE WOULD BE TO CONSIDER BOTH AT ONE TIME.

THAT'S NOT WHAT THIS COURT SAID. THIS COURT SAID THAT WE SUGGEST COURTS CONSIDER SUCH PROBLEMS WHEN DETERMINING WHETHER TO BIFURCATE AN INEFFECTIVE OF COUNSEL PLAN THAT'S WHAT THIS COURT SAID AND I THINK THIS CASE IS AN EXAMPLE WHERE THE COURT COULD BIFURCATE. WE HAVE A DEFENDANT WHO WAIVED MITIGATION, OKAY? WE HAVE A COLLOQUY ON DIRECT APPEAL THAT WAS COMPLETELY SUBSTANTIAL AND THIS COURT AS A MATTER OF FACT HAS CITED TO HENRY AS AN EXAMPLE OF AN EXTENSIVE WAIVER HEARING. YOU HAVE THAT. YOU ALSO HAVE A DEFENSE ATTORNEY WHO HAD THREE DOCTORS, AND YOU HAVE THE BACKGROUND INFORMATION THAT THE DEFENSE PROVIDED THAT IS EXACTLY THE SAME INFORMATION THAT MR.^RATICOFF SAID THAT HE CONSIDERED.

AGAIN, ISN'T THAT ONE THING THAT OVERLAPS?

NO.

HOW DOES THAT OVERLAP?

I'M TRYING TO EXPLAIN.

I'M SORRY, JUSTICE.

THERE MAY BE CASES WHERE MAYBE COUNSEL CONDUCTED AN INADEQUATE INVESTIGATION AND ONLY FOUND CERTAIN THINGS IN THE BACKGROUND. THEN SUBSEQUENTLY, THE COLLATERAL COUNSEL CONDUCTS A BETTER INVESTIGATION. COMES UP WITH THE SAME INFORMATION EVEN THOUGH THE INVESTIGATION WAS MUCH MORE THOROUGH AND THEREFORE THERE WAS NO PREJUDICE, EVEN THOUGH THERE WAS DEFICIENT PERFORMANCE. THAT'S WHY I THINK THOSE KINDS OF THINGS OVERLAP.

BUT IF COUNSEL, IF OLD COUNSEL AND NEW COUNSEL. .

CHIEF JUSTICE: IT IS NOT EFFICIENT. IT IS JUST NOT EFFICIENT IN THE LONG RUN. YOU HAVE YOUR EXPERTS THERE, TESTIFYING, AND AT THAT POINT THEY CAN GIVE THEIR OPINION ABOUT WHAT THEY FOUND.

THIS COURT'S OPINION WHERE THIS COURT EXPLAINED THAT IN THE CONTEXT OF DEFICIENCY AND PREJUDICE YOU LIKE TO HEAR BOTH. IT GIVES YOU A CONTEXT IN TERMS OF DECIDING WHETHER THERE WAS PREJUDICE BY LOOKING AT THE DEFICIENCY PRONG AS WELL. THIS COURT TALKED ABOUT THE FAIRLY WELL DOCUMENTED HISTORY OF ALCOHOLISM AND SYMPTOMS WHICH WERE INDICATIVE OF ANXIETY DISORDER. WE CITED TO THAT IN OUR BRIEF AND THIS CASE EVEN DR.^BLOCK-GARFIELD TESTIFIED. WHAT THE ATTORNEY COULD HAVE OR SHOULD HAVE OBSERVED OR WHAT THE PEOPLE WHO EVALUATED HER WERE ABLE TO OBSERVE OR SHOULD HAVE BEEN ABLE TO OBSERVE?

YES, YOUR HONOR. AS A MATTER OF FACT, DR.^HYDE WAS ASKED WHAT ARE THE KINDS OF THINGS THAT YOU WOULD LIKE TO HAVE DONE.

MR.^RATICOFF DID THAT. HE LOOKED AT POLICE STATEMENTS. HE CONFRONTED HIS CLIENTS WITH ALL OF THAT INFORMATION. TO GET HIM TO CHANGE HIS MIND, AND HE WOULDN'T --

BUT I THOUGHT NONE OF THAT INFORMATION WAS ACTUALLY GIVEN TO THE MENTAL HEALTH EXPERT. I MEAN IT SEEMS TO ME WHAT THEY ARE SAYING IS WE WANT THIS INFORMATION WHEN WE ARE DOING THE EVALUATION, BUT IF THE INFORMATION WASN'T GIVEN TO THEM, THEN HOW DO WE RELY ON THEIR EVALUATION?

WELL, THE RECORD SHOWS IN THIS CASE THAT BOTH MR.^RATICOFF HAD EXTENSIVE CONVERSATIONS WITH MR.^SOLOMAN. DR.^BLOCK-GARFIELD SAID SHE HAD EXTENSIVE CONVERSATION WITH MR.^SOLOMAN AND SHE DID TALK TO MR.^RATICOFF. THE ENTIRE SCOPE OF WHAT THEY WERE HOPING TO DO FOR THE DEFENSE WAS TO SHOW SUBSTANCE ABUSE, AND THEIR ORGANIC BRAIN DAMAGE THAT THEY CLAIM HE HAS NOW WAS SUPPOSED TO HAVE BEEN PRED DATE -- PREDICATED ON SUBSTANCE ABUSE. THIS IS NOT A DEFENDANT THAT CAN'T TIE HIS SHOES AND WALK. THIS IS A DEFENDANT WHO PARTICIPATED IN HIS DEFENSE.

CHIEF JUSTICE: WITH OUR HELP, YOU'VE NOW GONE THREE AND A HALF MINUTES.

CHIEF JUSTICE: SHE NOTED NO EVIDENCE OF LIKE AGAIN THE SIGN ON THE FOREHEAD, NO OBVIOUS EVIDENCE OF BRAIN DAMAGE IN HER EVALUATION.

YES.

SHE WASN'T LOOKING FOR IT. SHE WAS ONLY DOING A SCREENING TEST.

WELL, EXCUSE ME, I'M REALLY SOMEWHAT BAFFLED BY THESE KINDS OF ARGUMENTS.

CERTAINLY COMPETENCEY AND MITIGATION ARE TOTALLY DIFFERENT CONCEPTS. BUT HAVE YOU ASSERTED THAT THE COMPETENCEY EVALUATION AND SOMEHOW WAS INADEQUATE?

IT IS INADEQUATE FOR THE PURPOSE OF MITIGATION, ABSOLUTELY, YOUR HONOR.

NOT FOR THE PURPOSE OF MITIGATION. I'M ASKING YOU WAS IT IMPROPER, INSUFFICIENT, INADEQUATE FOR THE PURPOSES OF COMPETENCEY?

NO, WE HAVEN'T RAISED THE COMPETENCEY CLAIM IN THIS CASE.

AND CAN ONE DO A VALID COMPETENCEY TEST WITHOUT KNOWING SOMETHING ABOUT WHETHER THERE IS ORGANIC BRAIN DAMAGE?

WELL, COMPETENCEY DEALS WITH HOW --.

I UNDERSTAND WHAT IT DEALS WITH. MY QUESTION IS COMPETENCEY, WOULD NOT A PROFESSIONAL WANT TO KNOW IF A PERSON HAD SOME KIND OF BRAIN DAMAGE WHEN EXPRESSING AN OPINION?

I WOULD THINK THEY WOULD WANT TO KNOW.

WAS IT OR WAS IT NOT EXPLORED?

IT WAS NOT VETTED.

IT WAS NOT EXPLORED AT ALL?

THE OTHER THING IS SOMETHING THAT WE WANTED TO --.

CHIEF JUSTICE: ON THIS ISSUE ABOUT WHETHER THERE IS BRAIN DAMAGE, YOUR PROFFER, DID YOU NOT ASK TO PROFFER THE EXPERT? LET ME MAKE SURE WE ARE CLEAR ON THIS RECORD. YOU ASKED WHETHER YOU COULD PROFFER, WHETHER MR.^HENRY HAS BRAIN DAMAGE.

YES, AND PSYCHIATRIC ILLNESSES. HE HAS POSTTRAUMATIC STRESS DISORDER AND OTHER ISSUES AS WELL.

CHIEF JUSTICE: AND THE JUDGE WOULD NOT LET YOU PROFFER IT?

LET ME ASK YOU THE QUESTION I ASKED YOUR O OPPONENT. THE TRIAL COURT FOUND THAT MR.^RATICOFF TESTIFIED HE DIDN'T HAVE ANY INDICATION OF MENTAL ILLNESS, HEAD INJURIES, ORGANIC MENTAL DISORDERS, ET CETERA. DR.^GARFIELD TESTIFIED TO THE SAME THING. WAS THERE ANY TESTIMONY FROM YOUR EXPERTS TO CONTRADICT THAT FINDING BY THE TRIAL COURT THAT THERE WAS NO BASIS FOR EITHER THOSE TWO, THE MENTAL HEALTH EXPERT OR THE ATTORNEY TO HAVE BEEN AWARE OF MENTAL ILLNESS ORGANIC BRAIN DAMAGE?

THERE WOULD HAVE BEEN IF WE WOULD HAVE BEEN ALLOWED TO PUT IT ON. I THINK DR.^DUDLEY SPENT A LOT OF TIME INTERVIEWING FAMILY MEMBERS. AND I WOULD LIKE TO CLEAR UP --

MY REQUEST QUESTION IS: DID THE TRIAL COURT PROHIBIT YOU FROM PUTTING ON THOSE WITNESSES NOT TO TESTIFY TO THE PRESENCE BUT TO TESTIFY THAT MR.^RATICOFF AND DR.^GARFIELD SHOULD HAVE BEEN AWARE OF MENTAL ILLNESS OR ORGANIC BRAIN DAMAGE, THAT THEY WERE NOT AWARE OF AND IT WOULD HAVE BEEN OBVIOUS TO THEM AT THE TIME OF THEIR EVALUATIONS OR DEALING WITH THE DEFENDANT?

AGAIN, I AM NOT SURE HOW OBVIOUS IT WOULD HAVE BEEN TO MR.^RATICOFF. YOU HAVE TO

REMEMBER IN THE PENALTY PHASE HIMSELF HE WAS MUDDLED AS TO THE DISTINCTION BETWEEN A PSYCHIATRIST AND A PSYCHOLOGIST. HE KEPT CALLING DR.^BLOCK-GARFIELD A PSYCHIATRIST WHERE HE IS A PHD AND PSYCHOLOGIST AND HE KEPT GETTING MIXED UP ABOUT IT DURING THE EVIDENTIARY HEARING. ALL OF THE PEOPLE HE HAD EVALUATION MR.^HENRY WAS PSYCHOLOGIST BUT HE KEPT CALLING THEM PSYCHIATRISTS. SO WHAT WOULD HAVE BEEN EVIDENT TO MR.^HENRY, TO RATICOFF IS ONE THING. WHAT WOULD HAVE BEEN EVIDENT TO A COUNSEL WHO KNEW WHAT THEY WERE LOOKING FOR IS SOMETHING ELSE, AGAIN. AND AGAIN THE STANDARDS, I INVITE YOU TO CONSULT WITH THESE EXPERTS AND TO TALK WITH THEM AT LENGTH.

THE TRIAL COURT FOUND THAT DR.^GARFIELD TESTIFIED THAT SHE WOULD HAVE NOTICED ANY EVIDENCE OF MENTAL ILLNESS AND MENTAL RETARDATION OR ORGANIC BRAIN DAMAGE. HER EVALUATION DID NOT AFFECT DRUG USAGE, MENTAL ILLNESS, INAPPROPRIATE RESPONSES, ORGANIC BRAIN DAMAGE OR ANYTHING ELSE WHICH WOULD HAVE BEEN USED IN MITIGATION.

BUT SHE DID AGREE THAT NEUROPSYCHOLOGICAL TESTING WAS NOT DONE AND THAT WAS THE PROPER WAY TO DETERMINE DEFINITIVELY WHETHER BRAIN DAMAGE EXISTS.

SO THAT WOULD MEAN IF WE ACCEPT YOUR PROPOSITION, THAT THERE HAS TO BE A NEUROPSYCHOLOGICAL EVALUATION IN ADDITION TO THE PSYCHOLOGICAL EVALUATION IN ANY CASE, EVEN IF THERE IS NO INDICATION IN THE INITIAL EVALUATION OF ORGANIC BRAIN DAMAGE?

NOT NECESSARILY BECAUSE IF TRIAL COUNSEL HAD DONE A PROPER SOCIAL HISTORY HE WOULD HAVE NOTICED THAT THERE WERE INDICATIONS THAT SHOULD HAVE PUT HIM ON NOTICE TO INVESTIGATE BRAIN DAMAGE BY NEUROPSYCHOLOGICAL TESTING IN THIS CASE.

AND WHAT WERE THOSE?

HIS HISTORY OF CHILDHOOD TRAUMA, ABUSE, NEGLECT, EXTENSIVE DRUG USE DURING THE DEVELOPMENTAL PERIOD, AND ON A NUMBER OF OTHER THINGS.

AND WHAT WAS THE EVIDENCE OF THE EXTENSIVE DRUG USE?

JOE HENRY WHO TESTIFIED AT THE EVIDENTIARY HEARING WHO WAS NEVER INVESTIGATED AT THE TIME OF THE TRIAL.

BEFORE YOU SIT DOWN I WANT TO --.

CHIEF JUSTICE: BEFORE YOU SIT DOWN I WANT TO CLARIFY ABOUT THE EVIDENCE IN THIS CASE. THE COURT'S ORDER WAS NOT ENTERED UNTIL TWO YEARS AFTER THE FINAL EVIDENTIARY HEARING. COULD YOU -- WERE YOU TRIAL COUNSEL IN THE EVIDENTIARY HEARING?

YES, INDEED, YOUR HONOR.

CHIEF JUSTICE: WAS THERE, TO YOUR KNOWLEDGE, WHAT WAS THERE -- WHAT WAS THE REASON FOR THE DELAY?

I HAVE NO IDEA, YOUR HONOR.

CHIEF JUSTICE: AND THEN THE TRIAL COURT'S ORDER WAS ENTERED IN JANUARY OF 2003. WE ARE NOW THREE YEARS LATER. WHAT WAS THE REASON FOR THE DELAY ON APPEAL?

WELL, I THINK THERE WERE A NUMBER OF FACTORS INVOLVING A NUMBER OF FACTORS IN THE RECORD. MR.^HENRY DID, WITH THE STATE'S AGREEMENT, FILE A MOTION TO CONSOLIDATE WITH

HIS DNA APPEAL AND THAT WAS DENIED BY THIS COURT, AND THEN THE INITIAL BRIEF GOT STRUCK AS A RESULT OF THAT BECAUSE OF THE REFERENCE TO THE DNA APPEAL WHICH I THINK THEY THOUGHT WOULD BE CONSOLIDATED SO THAT FURTHER CAUSED THE DELAY IN THE APPEAL. I DON'T THINK EITHER OF THE APPELLATE, ANY APPELLATE ISSUES CAN BE ATTRIBUTABLE TO THE FAULT OF ANY PARTICULAR PARTY, YOUR HONOR.

CHIEF JUSTICE: THANK YOU TO BOTH SIDES.